No. 16-1519

In the Supreme Court of the United States

SERGIO FERNANDO LAGOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

In examining Section 3663A(b)'s meaning, the government starts by looking everywhere *except* Section 3663A(b). It says to look to the so-called "ordinary" meaning of restitution, which appears nowhere in the statute. It says to look to the "statutory purpose," which is found in a Senate report, but not the statute. It says to look to the definition of "victim"—which, of course, defines eligible *victims* (under *subsection (a)*), but (critically) not the *types of restitution* victims may receive (under *subsection (b)*). And it says to look to 18 U.S.C. 3664(f)(1)(A), which is a *procedural* statute designed to enforce the *substantive* provisions found elsewhere; no one thinks Congress used Section 3664 to silently override the explicit limits on restitution found in Section 3663A(b)'s operative provisions.

The government wants to talk about everything but the text because the actual text forecloses its position. Section 3663A(b) does not provide for "full restitution," even though other statutes tellingly do. The operative section lists four detailed, specific categories of recovery that provide meaningful relief without inviting complex, fact-intensive disputes better suited to civil litigation. The government cannot satisfy multiple conditions in Section 3663A(b)(4)'s plain text, and it cannot explain the clear and obvious differences between this statute and other restitution provisions, where (unlike here) Congress *did* provide make-whole relief. GECC's investigation and litigation expenses fall outside the MVRA's scope, and they should have been excluded.

A. Section 3663A(b)(4)'s Plain Text Unambiguously Excludes Independent Internal Investigations And Separate Civil Litigation

1. i. The government says that "[t]he ordinary definition of criminal 'restitution' is the restoration of the victim to the position that it occupied before the offense." Br. 13, 18. That "ordinary definition" might be relevant if Congress had *adopted* that definition in the statute. But whatever the "ordinary definition" might be, Congress instead enacted a very different scheme. It enumerated four specific, detailed categories of eligible recovery (18 U.S.C. 3663A(b)), and it did so against a backdrop where restitution is *not* authorized absent a positive statutory command (*United States* v. *Mitchell*, 429 F.3d 952, 961 (10th Cir. 2005)).

Congress *could* have replaced Section 3663A(b)'s detailed list with a simple directive that courts restore victims to their prior position—which, in fact, is closer to what Congress did in *other* restitution provisions (*e.g.*, 18 U.S.C. 2248; 18 U.S.C. 2259). Instead, however, Congress specified the precise expenses to include in the mandatory restitution order, and it thus necessarily excluded expenses falling outside those enumerated categories. Those categories, and not some general "definition," are controlling.

Indeed, the government admits elsewhere that Section 3663A(b)'s particular language controls. Br. 44. Yet the government does not explain what role that subsection plays if *all* losses are covered under the "ordinary" definition. As the D.C. Circuit explained, "[t]his is not a consequential damages statute. This text has a narrower focus." *United States* v. *Papagno*, 639 F.3d 1093, 1100 (D.C. Cir. 2011) (Kavanaugh, J.). The government may prefer a different, broader version that mirrors the so-

called "ordinary" definition, but it is not the one Congress provided.[1]

ii. According to the government, the MVRA's statutory purpose is "to provide 'full restitution to all identifiable victims of covered offenses.'" Br. 18 (quoting S. Rep. No. 179, 104th Cong., 1st Sess. 18 (1995)). But Congress did not use this general sense of "purpose" to supplant its explicit enumeration of four defined categories in the actual statute.

Congress does not pursue a statutory purpose at all costs, and the legislative purpose is ultimately reflected in the actual text. The quoted Senate Report was not voted on by Congress or signed by the President. The *enacted* provision reflects a specific, detailed list of covered expenses, even though Congress swept more broadly in other restitution provisions. It knew how to provide restitution for "full losses," but it adopted a narrowed scope here. If Congress wished to authorize "full restitution," it would have said so in the actual text—just as it did in multiple other provisions. *E.g.*, 18 U.S.C. 2259.

iii. The government repeatedly cites 18 U.S.C. 3664(f)(1)(A) for the proposition that Congress "explicit[ly]" provided for "full restitution" in the MVRA's text. Br. 29, 44. But Section 3664(f)(1)(A) contains a *procedural* directive, not a substantive one. See 18 U.S.C. 3664 ("Procedure for issuance and enforcement of order

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[1] Congress has implicitly confirmed that it does not share the government's understanding. As previously explained, Congress enacted legislation in 2016 requiring the GAO to study a possible *expansion* of the MVRA to "require that the defendant pay to the victim an amount determined by the court to restore the victim" to its prior position. Pet. Br. 5 (describing the Justice for All Reauthorization Act). Such a study was necessary because Congress understood the existing version to provide narrower relief.

of restitution"). It does not redefine the express categories and limitations in Section 3663A(b) or any other restitution provision. It simply directs that courts "shall order restitution to each victim in the full amount of each victim's losses *as determined by the court*," and courts make those determinations by employing the substantive statutes.

If Section 3663A(b) authorized "full restitution," the government would cite—*Section 3663A(b)*. Its repeated retreat to Section 3664 confirms its textual failings.

iv. In an extended discussion, the government argues that GECC was a "victim" because it was "'directly and proximately harmed'" by the offense. Br. 16-23 (quoting 18 U.S.C. 3663A(a)(1)). This discussion is largely irrelevant. Everyone agrees that GECC is a "victim" (18 U.S.C. 3663A(a)(2)), and that Congress defined the category of "victims" expansively. It wanted to ensure that more people affected by crime were eligible for restitution. But that says nothing about the *scope* of restitution available for those eligible victims. That question is answered by Section 3663A(b), not Section 3663A(a).

The government responds that Section 3663A(a)(2)'s definition of "victim" is relevant to construing Section 3663A(b), because statutory construction is "a holistic endeavor." Br. 21-22 (citation omitted). Certainly true, but here Congress used each part of the statute for a different function. It could not have spoken any more plainly in using language in subsection (a) to say *who* is a victim. And it could not have spoken any more plainly in subsection (b) to say *which expenses* are eligible. It is not reading a statute "holistically" to bulldoze the clear statutory structure, eliminate the clear differentiation between sections, and ignore the plain text to presume that Congress intended the definition in (a) to rewrite the specific categories in (b).

And the government further ignores the reason that Congress would have preferred a *broader* definition of "victim": again, it cast a wide net so that anyone who incurs *the type of expenses in subsection (b)* is actually eligible to recover those expenses. If Congress instead meant to simply authorize any expenses "directly and proximately" caused by the crime, it would have said that—full stop—without taking care to specify *permissible* restitution under the statute. And we know that Congress was fully aware how to do that because, again, *it did exactly that* in other restitution statutes. Congress's choice of a narrow provision here was presumptively deliberate.

Enforcing the clear delineation between subsections (a) and (b) is thus very much "compatible" (Gov't Br. 22) with the rest of the law. What is *incompatible* is attempting to conflate a broader standard with four detailed, narrow categories in order to sweep past the limits Congress textually inserted into the statute.

2. When the government finally turns to the actual statutory text, its reading fails on multiple levels. According to the government, GECC's "investigatory" expenses are covered because its efforts ultimately "helped the government" and "supported its prosecution." Br. 24-25. But even if GECC's private effort was *useful* to the investigation or prosecution, that does not establish that GECC's costs were incurred (i) "during" (ii) its "participation" (iii) in the government's "investigation," much less (iv) that it was "necessary" to that investigation. It merely shows what the government repeatedly says: the effort was possibly useful to the prosecution, which is not Section 3663A(b)(4)'s controlling standard. In any event, "[c]all it *ejusdem generis* or call it common sense" (NACDL Amicus Br. 3)—Section 3663A(b)(4)'s specific listed examples

are nothing like professional fees, and those fees accordingly fall outside the "other expenses" contemplated by the provision.

i. According to the government, "the investigation" can mean *any* investigation, so any private costs incurred participating in a private investigation are covered. Br. 26-29. This reading cannot be squared with the statute's plain text, and it would produce a series of absurd results.

a. Under a proper construction, "the investigation * * * *of the offense*" means the government's investigation, just as the "prosecution *of the offense*" means the government's prosecution. The entire focus is on "the offense," which is a criminal term. See 18 U.S.C. 3663A(a)(1) ("convicted of an offense"). The investigation is thus a criminal investigation. Private parties do not conduct criminal investigations; the government does.

And if Congress had in mind any private investigation, it would not have deliberately linked the terms "investigation" and "prosecution." Congress grouped those terms together, and introduced them as a unit ("*the* investigation or prosecution"). And it phrased those terms in the singular. It is accordingly "plain" that "'*the* investigation' for which restitution is available under § 3663A(b)(4) is the government's official investigation, not an entirely separate one engaged in by the victim's relatives." *United States* v. *Juvenile Female*, 296 F. App'x 547, 551 (9th Cir. 2008) (Berzon, J., dissenting).

b. The government responds that Congress could have said "the government's investigation" if that is what it meant. Br. 26. But this completely ignores the full text and context of the provision. Just as Congress did not have to say "the government's *prosecution*," it likewise did not have to say "the government's *investigation*." And that is especially true, again, when it is not simply any investiga-

tion, but an investigation *of the offense*. Only the government conducts criminal investigations, and Congress had no need to spell out what was obvious from context.

Had Congress wanted to capture private investigations, it would have said so directly. It would have included in the enumerated list at least *some* kinds of expenses the government says Congress had in mind. Yet there is no reference to auditors, lawyers, accountants, forensic experts, or any other actors commonly used in private investigations. Section 3663A(b)(4) is instead framed exclusively in terms of indirect, day-to-day, incidental expenses from traveling and meeting with the government to provide the kind of testimony and evidence most naturally described as *participating* in the official investigation.

Finally, the government ignores the broader statutory scheme. Congress did indeed include private investigations in *other* restitution provisions, but not this one. Those other sections cross-reference Section 3663A (*e.g.*, 18 U.S.C. 2259(a)), so this was not an accident of legislative drafting. Congress used different language in different provisions, and those differences *mean* something. *Papagno*, 639 F.3d at 1099-1100. The government has no sound answer for any of these points.

c. The government also argues that Section 3663A(b)(4)'s text does not "dictate that only one 'investigation' may occur." Br. 26 (citing 1 U.S.C. 1). But the Dictionary Act does not automatically apply simply because *some* singular words are sensibly read as capturing the plural; it requires courts to consider the surrounding words and context. *Rowland* v. *Cal. Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 199-200 (1993).

Here, the entire focus is on providing restitution for "a defendant convicted of *an offense*." 18 U.S.C. 3663A(a)(1) (emphasis added). The restitution is accordingly linked to

that offense; the victim (harmed by that "offense," 18 U.S.C. 3663A(a)(2)) can seek reimbursement for participating in "the investigation or prosecution" of *that* "offense." 18 U.S.C. 3663A(b)(4). And the text says "*the* investigation," not any investigation, and that investigation, again, is of "*the* offense." The context is unmistakable: "the singular 'offense' referred to in § 3663A(b)(4) is of course the criminal offense of conviction," and "[t]he singular 'investigation or prosecution' of 'the offense' is therefore the criminal investigation and prosecution that is usually conducted by the FBI or other federal investigators and the local United States Attorney's office." *Papagno*, 639 F.3d at 1097-1098.

d. Finally, the government's theory would produce absurd results. If the government is right, a private party is entitled to restitution for its own investigation *even if it never discloses the results to anyone*. The statutory requirements can be met simply by showing an expense necessary *to that investigation* and incurred while "participating" in that investigation. There is no statutory hook to limit recovery to situations where the investigation has some use in the official prosecution.

Moreover, it would likewise make no difference whether the investigation arose before or after the government's investigation—or even after a final conviction. So long as the restitution request was submitted within the statutory deadline, the government's theory leaves no obvious basis for excluding the recovery.

While it is theoretically possible that Congress could craft such a scheme, there is no indication that it did so here. The more natural reading is to take the statute to mean what it says. The text says the investigation *of the offense*, which accordingly is the government's criminal investigation. Private investigations are not covered.

ii. The government argues that GECC "participated" in the investigation because its work supposedly "helped the government" and "supported the prosecution." Br. 24-25, 30.

This flouts the common understanding of that term. The government is correct that the term is "broad" (Br. 30), but it is not limitless. It does not include simple aiding and abetting, and it requires "taking part"—*participating*—in another's activity. Pet. Br. 20-21. A victim surely can *assist* the government's investigation by doing independent work. But a private party does not "participate" in the government's investigation by conducting its own inquiry entirely unbeknownst to the government. No one, for example, learns that a witness will "participate," and then expects the witness to walk off in the other direction to conduct an entirely separate investigation. One instead expects the witness to meet with the government and disclose what he or she knows.

Put simply: "If assisting the criminal investigation were alone enough to constitute 'participation' in the criminal investigation, as the Government argues, then even an internal investigation that *preceded* the criminal investigation could qualify as 'participation.'" *Papagno*, 639 F.3d at 1099; see Gov't Br. 30 (embracing this view). Yet it makes little sense to say one can "take part in" something that does not yet exist. *Ibid.* If Congress intended such an unusual result, one would expect clearer language than this.[2]

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[2] The government concedes that "participation" has "some limits," but says those limits "will depend on all the facts and circumstances." Br. 31. That is not an intelligible standard for administering these cases. This involves criminal sentencing. These proceedings rely on speed and certainty. A standard that turns on some vague (and unspecified) grouping of "all the facts and circumstances" is unworkable

iii. a. The government attacks petitioner's reading of the term "during," and says that expenses are covered even if they were incurred before the investigation began. Br. 31-32. Yet in offering a plain-text interpretation of "during," the government says—nothing. It says petitioner is somehow wrong, but the government never says what else the term could possibly mean. The concept plainly requires action while the investigation is ongoing; it excludes anything before or after. The government may dislike the language, but it cannot simply read it out of the statute.

b. Because the government has no answer for the plain text, it instead focuses on policy. According to the government, it would "make little sense" to preclude restitution for someone "proactive" in initiating a private investigation while providing restitution for someone "prodded" to participate. Br. 29.

The government is wrong on multiple levels. For one, Congress had sound reasons to limit expenses to those incurred "during" participation in the government's efforts. That requirement lets the government provide guidance and input on the subject and scope of the party's efforts. It ensures maximum cooperation and reduces the risk of unnecessary or excessive expenses. And it helps avoid actions that interfere with the government's work. *E.g.*, *Papagno*, 639 F.3d at 1100 n.5. A "proactive" investigation, by contrast, invites those costs and risks.

Moreover, the term "during" underscores the very point of the provision: Section 3663A(b)(4) targets the incidental costs of working with the government to advance

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for the "thousands" of sentencing proceedings where this issue arises (Gov't Br. 17). While the government says courts have not had "substantial difficulty" applying its (non)standard, not everyone agrees. Pet. App. 8a (Higginson, J., concurring) ("I do not envy district courts faced with this task.").

its work. It focuses on the kinds of costs that are incurred "during" participation with the government, because that is the sole participation that Congress had in mind for this provision. It thus makes perfect sense that Congress would mention the type of out-of-pocket costs (transportation and child care) to facilitate meeting with agents or testifying at hearings; those costs happen *during* the government's efforts. It is telling that nothing in the statute suggests Congress intended to cover a private investigation operating entirely apart from the government's work.

c. As petitioner explained (Br. 21-22), there is a "critical" difference in language between the MVRA and the VWPA—the former says "during," while the latter says "related to." The government brushes aside this difference, saying "different words used in different [provisions]" can still "mean roughly the same thing." Br. 32 (quoting *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 845 (2018)). The point, however, is not that disparate language *never* means the same thing, but that it presumptively does not mean the same thing. Here, Congress copied over the VWPA's text but conspicuously modified this key clause; the modification was presumably for a reason.

The government asserts that "[m]ultiple" circuits have "found no meaningful difference" between the two provisions. But the government ignores that the Second Circuit—a court on its side of the split—has acknowledged exactly the point petitioner makes here (*United States* v. *Cuti*, 778 F.3d 83, 96 n.5 (2d Cir. 2014)), and it likewise ignores Judge Berzon's dissent—which went effectively unanswered by the Ninth Circuit majority. *Juvenile Female*, 296 F. App'x at 551. And the remaining courts of appeals did not squarely acknowledge the issue or explain away the linguistic difference; these courts apparently overlooked it. This is why the government fails to cite a

single case, anywhere, grappling with the issue and explaining that Congress used markedly different terms here to accomplish exactly the same thing.[3]

In the end, the government is correct that a temporal limit might not capture the entire universe of restitution. Br. 29. But Congress deliberately used broader language in other restitution provisions, and it left certain gaps here. That is a decision for Congress, not the courts, and it is not the judiciary's role to rewrite Congress's work. *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1726 (2017).

iv. a. As previously explained (Pet. Br. 23-24), Section 3663A(b)(4) covers only "necessary" expenses, and an expense is not "necessary" if nobody required or requested it. *Papagno*, 639 F.3d at 1100.

In response, the government argues that the term "necessary" only asks if the expense is "appropriate" or "reasonably useful." Br. 26, 33. But this does not explain why private investigations are "necessary" in this context: Was it necessary for GECC to conduct its own private inquiry when the government could have done the work on its own? And was it necessary when the government will inevitably examine that same evidence itself?[4]

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[3] The government further finds it odd that the MVRA might "allow[] *less* restitution" than the VWPA. Br. 32. But restitution under the MVRA is *mandatory*, and there was reason to temper the reach of (potentially unwieldy) provisions given that mandatory command. Further, the government overlooks other instances where the VWPA plainly sweeps broader than the MVRA. See, *e.g.*, 18 U.S.C. 3663(b)(6).

[4] Contrary to the government's contention (Br. 23), GECC's private investigation did not "enabl[e]" the government's prosecution. There is no indication that the government did not (or could not) do its own investigation. And, in fact, it would be rare for the government to simply take a private party at its word rather than take its own look at alleged misconduct.

This shows the dangers of letting a private party conduct its own investigation without government input or supervision. It is entirely possible (if not probable) that GECC, working at the government's direction, could have avoided most or all of these expenses. And there is no indication that Congress intended to include those significant costs as a *mandatory* part of a criminal sentence—especially by authorizing incidental, indirect expenses (child care and transportation) associated with "participating" in the government's investigation.

b. According to the government, the prosecutors "explained to the sentencing court" that "GE Capital's investigatory actions were 'ultimately vital to the later prosecution.'" Br. 24 (quoting J.A. 18); accord Gov't Br. 9, 13, 31. This is misleading. The prosecutors did not say that *all* of GECC's efforts were "vital"; they said only that *preserving the electronic data* was "vital." J.A. 18. That constituted less than $21,000 of a $4.895 million award. The prosecutors did not indicate the evidence would have otherwise been destroyed (indeed, petitioner confessed); and they did not suggest that federal agents could not have made the same copies on their own, avoiding the private expense.

This highlights precisely the problems and guesswork that the government's theory invites. As Judge Higginson explained (Pet. App. 7a-11a), it is difficult enough for courts to assess legal fees after observing an entire case; here, judges are asked to approve fees in a truncated proceeding where efficiency and speed make it nearly impossible to responsibly resolve complex, fact-intensive disputes.

There is every reason to think that Congress did not intend to invite those kinds of difficult inquiries in the "tens of thousands of [annual] sentencing proceedings"

under the MVRA (Gov't Br. 17); see also 18 U.S.C. 3663A(c)(3)(B).

v. Petitioner previously explained that professional fees fall outside Section 3663A(b)(4) under a straightforward application of ejusdem generis. Br. 24-26. In response, the government argues that ejusdem generis does not apply because "the statute's specific terms 'do not fit into any kind of definable category.'" Br. 40-41 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 209 (2012)). As the government sees it, there is no clear connection between "lost income," "child care," and "transportation" aside from the fact that all are "'expenses that one might conceivably incur while participating in an investigation or prosecution or attending proceedings.'" Br. 41.

But the government ignores the obvious connection: each term captures incidental, out-of-pocket expenses required to *enable* "participation." Each one reflects the indirect costs of skipping day-to-day activities to meet with agents or testify at trial. None, by contrast, involve the direct costs of a private investigation.

Nor was it "anomalous" for Congress to cover "'incidental' or 'minor' expenses while ignoring 'direct' or 'major' expenses." Gov't Br. 41. This simply confirms that Congress did not have private investigations (or their direct, major costs) in mind. And if Congress did have those expenses in mind, the true anomaly would be Congress's choice only to list incidental expenses without a single hint that anything else was included.

The government further argues that Congress listed the expenses it did because they "might otherwise be overlooked." Br. 14, 41-42. But even were that a concern, this is still not how Congress would have drafted the statute. Congress would have said victims can recover "nec-

essary expenses, *including* child care and transportation"; it would not have said, as it did here, that victims can recover "child care, transportation, *and other expenses*." And this is especially obvious given the contrast between Section 3663A(b) and other restitution provisions, where Congress indeed provided for *full restitution*, and then specifically noted that such restitution "includes" a specific list of costs.

The different phrasing is telling: Congress is well aware of principles of ejusdem generis, and it would have known that employing the critical formulation—specific expenses followed by a general catchall—invokes the canon. Scalia & Garner, *supra*, at 212 ("Any lawyer or legislative drafter who writes two or more specifics followed by a general residual term without the intention that the residual term be limited may be guilty of malpractice."). The government cannot explain why Congress would have adopted the opposite formulation in other restitution provisions but invoked the classic ejusdem generis formulation here.

Finally, the government argues that there was no need to list "[a]ttorney's fees and accounting costs" because those expenses were unlikely to be overlooked. Br. 42. Yet those fees *are* separately enumerated in other restitution statutes when Congress wanted to include them. *E.g.*, 18 U.S.C. 2259(b)(3)(E). The government again does not explain why Congress would have felt the same fees would be "obviously" covered under the MVRA but not covered under *broader* restitution provisions.[6]

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[6] Nor is it "deeply inequitable" (Gov't Br. 42) to leave professional fees uncovered. The fact that an expense is not included in restitution does not mean it is not reimbursable. It simply reflects Congress's determination that certain expenses are more appropriately pursued in traditional civil litigation. Pet. App. 11a. And Congress has reduced

3. According to the government, GECC "was forced to spend millions of dollars attempting to recover as much of its loan principal as possible in the bankruptcy proceedings," and those full costs "are recoverable in restitution" under the MVRA. Br. 36. The government is wrong.

i. The government's textual argument is indefensible. According to the government, the entirety of GECC's expenses qualify as "'expenses incurred during * * * attendance at proceedings related to the offense.'" Br. 37 (quoting 18 U.S.C. 3663A(b)(4)). But this provision covers the expense of *attending* certain proceedings; it does not cover all expenses *incurred during those proceedings*. "Attendance" is the key term, and its meaning is plain. It covers the expense of showing up, but there is no plausible interpretation that "attendance" also includes *the background work of litigating the case*. A victim may eventually "attend" a hearing on a motion, but no one rationally says that the cost of "attendance" includes the legal fees that went into the days or weeks of researching, drafting, and filing the underlying brief.

The surrounding text forecloses any lingering doubt. Section 3663A(b)(4)'s enumerated expenses—"child care" and "transportation"—contemplate *physical* attendance, not background work. One might have to catch a cab to a hearing, but no one thinks Congress had in mind catching a cab to the office to draft a motion for a hearing months away.

This alone establishes the error below. GECC's costs were not for "attending" the proceedings; they were for litigating the entire bankruptcy case. J.A. 26-29. There is

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the burden of that litigation by "estop[ping] the defendant from denying the essential allegations of th[e] offense" in subsequent civil proceedings. 18 U.S.C. 3664(*l*).

no textual basis of any kind for that recovery, and the government did not even attempt below to distinguish between the minimal costs of attendance versus the massive costs of consulting and providing legal advice for the case.[6]

ii. In any event, contrary to the government's contention (Br. 38-40), the sole "proceedings" related to the offense are *criminal* proceedings, not civil ones. Congress did not have to include the "modifier 'criminal'" (Br. 38), because the context already made it obvious. Pet. Br. 18-19. Indeed, the entire statutory context reinforces a uniform focus on criminal proceedings. And where each clause plainly involves a criminal action, the remaining clause is read to assume the same characteristics. Scalia & Garner, *supra*, at 196 (describing noscitur a sociis); Pet. App. 7a (Higginson, J., concurring).[7]

Moreover, it makes little sense to presume that Congress wished to reimburse victims for "attendance" at their own civil proceedings, but not the full underlying expense of the case. If Congress felt that the costs of private litigation should be included, there is no plausible explanation for why it would have drawn the line at attendance, as opposed to professional fees or (say) filing costs. The alternative explanation is obvious: When the government conducts a criminal hearing, *it assumes all other costs.*

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[6] Nor does it matter that GECC "appear[ed] in the bankruptcy proceedings 'to protect its rights and preserve its collateral.'" Br. 38 (quoting J.A. 27). The same is true of any victim filing a civil action to seek damages or relief. Yet no one seriously maintains that all parallel civil litigation is covered under Section 3663A(b).

[7] And the plural ("proceedings") is easily explained: Congress knew that criminal prosecutions proceed in phases, including multiple separate proceedings (grand-jury hearings, initial appearances, bond hearings, jury selection, the trial, post-trial sentencing, etc.). Read in context, this is the only plausible interpretation of that phrase.

The only remaining costs involve the incidental expenses of getting a witness to court to attend or testify in person. That participatory role is necessary to the government's efforts, and it is the only role contemplated by Section 3663A(b)(4).[8]

B. Section 3663A(b)(4)'s Statutory Context And History Confirm That Restitution Is Unauthorized For These Expenses

1. As previously explained, Congress enacted the MVRA against a backdrop of other statutes that expressly provide the "full restitution" the government says was intended here. Yet rather than repeat the same broad formulations found in those sections, Congress instead drafted Section 3663A(b)(4) with a list of four, specific, detailed categories. The government has no real answer for this obvious problem with its argument: Congress drafted both broad and narrow restitution statutes, and it plainly drafted a narrower version here.

The government barely acknowledges the import of those other statutes. It says that "Congress's offense-specific restitution statutes have a distinct structure: they require restitution for 'the full amount of the victim's losses'

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[8] The government suggests GECC's bankruptcy expenses should be covered because its efforts in those proceedings "significantly *reduced* the amount of principal that petitioner would otherwise have owed as restitution." Br. 36 (arguing that GECC's efforts should not leave it "in a worse position"). This is puzzling: GECC is most assuredly *better* off for having litigated to recover assets in Dry Van's bankruptcy. The only reason the restitution amount is lower is *because GECC actually recouped losses (approximately $15 million) it was otherwise owed.* J.A. 48, 70. Had it not participated, it would have saved some professional fees, but it would also have been left with a higher unpaid balance (assuming other creditors claimed the assets in the bankruptcy case). A party who recovers in civil litigation may be entitled to less restitution, but it is generally accepted that ordinary litigation expenses are not covered by the MVRA.

and then define that term to 'include[ ]' particular costs, including 'attorney's fees, as well as other costs incurred,' and 'any other losses suffered by the victim as a proximate result of the offense.'" Br. 42-43. This is exactly *petitioner's* point: Congress could have authorized the same sweeping restitution here, but instead limited the MVRA to four specific, detailed categories. Unlike those other provisions, Section 3663A(b) does not approach make-whole relief.

This Court has repeatedly emphasized that Congress's use of different terms in different sections suggests Congress intended a different result. It crafted broad statutes elsewhere, and those statutes cross-reference the MVRA by name—to say the broader provisions apply *notwithstanding* the MVRA. Section 3663A(b)'s plain text should not be distorted to mirror the extensive restitution that Congress authorized in other sections, but not here.

2. The government argues that the 2008 amendment to the VWPA—adding Section 3663(b)(6)—does not suggest that private investigation expenses fall outside Section 3663A(b)(4). According to the government, "Section 3663(b)(6) does not refer to internal investigations at all, but instead to the 'time value' of remediation efforts by identity-theft victims." Br. 34-35. This misses the point. The idea is that, under the government's theory, those "remediation" expenses would *already* be covered under Section 3663(b)(4) or (b)(1). Congress instead elected to expand the remedy for identify-theft victims without creating any corresponding coverage under the MVRA. As

Papagno explained, that decision was presumptively deliberate.[9]

C. The Government's New Argument Under Section 3663A(b)(1) Is Improperly Presented And Meritless

As an alternative ground for affirmance, the government argues, for the first time in this litigation, that Section 3663A(b)*(1)* independently covers GECC's expenses by mandating restitution for all proximately caused losses. This new contention is not properly before the Court, and it is otherwise meritless.

1. The government's new Section 3663A(b)(1) argument is not properly presented. The Court generally refuses to consider "questions neither raised nor resolved below." *Glover* v. *United States*, 531 U.S. 198, 205 (2001). And it has consistently reminded litigants that it is "'a court of review, not of first view.'" *Chaidez* v. *United States*, 568 U.S. 342, 357 n.16 (2010).

Below, the government supported restitution with paragraph (b)(4), not (b)(1). See J.A. 17, C.A. Gov't Br. 12; cf. Br. 46. The Court's usual caution against addressing new issues is particularly warranted here, where even the government's own authority explains that paragraph (b)(1) requires a "fact-specific," "individualized inquiry." *United States* v. *Corey*, 77 Fed. App'x 7, 10 (1st Cir. 2003)

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[9] According to the government, attorney's fees are covered despite the lack of a clear statement because "this Court has never held that such a clear-statement rule applies to Congress's criminal restitution statutes." Br. 44 n.7. But if the targeted fees were spent in a civil case, there is every reason to believe the same fee-shifting rules would apply. Indeed, if anything, one would presume an especially strong need for a clear-statement rule given the setting—a statute authorizing *criminal punishment*. Aside from baldly asserting that the American Rule is inapplicable, the government does not explain why the Court should permit fee-shifting without explicit legislative direction.

(emphasis removed); see, *e.g.*, *CRST Van Expedited, Inc.* v. *EEOC*, 136 S. Ct. 1642, 1653-1654 (2016). Although the district court necessarily found that GECC was proximately harmed (18 U.S.C. 3663A(a)(2)), it did not consider whether petitioner's offense proximately caused GECC's expenses. This Court should not address that question in the first instance.

2. Regardless, the government's interpretation of Section 3663A(b)(1) is wrong. That section provides that, where the "offense result[ed] in damage to or loss or destruction of property of a victim of the offense," the defendant must "return the property." 18 U.S.C. 3663A(b)(1)(A). If return is "impossible, impracticable, or inadequate," the defendant must repay the property's value. 18 U.S.C. 3663A(b)(1)(B). The obvious import of these provisions is that a property crime entails the defendant taking (or damaging) property, so he must "return" it (subparagraph (A)) or restore its value (subparagraph (B)). The focus is on the property that was the subject of the illegal conduct. In a theft, the "lost" property is what was stolen (*e.g.*, the vase), not the expenses incurred to investigate whether anything else was taken and how the culprit bypassed security. Accordingly, paragraph (b)(1) orders the vase returned, not the investigatory expenses. The theft did not cause those latter expenses any more than a botched surgery causes a malpractice suit, even though that suit is "foreseeable." But Section 3663A(b)(1) does not contemplate all expenses that may have been "caused, in some Palsgrafian sense," by the theft. *Papagno*, 639 F.3d at 1100.

Had Congress wanted to include all losses proximately caused by the offense, it knew how to do so. It instead wrote a far more limited provision. See, *e.g.*, *United States* v. *Zander*, 794 F.3d 1220, 1233 (10th Cir. 2015); *United States* v. *Amato*, 540 F.3d 153, 161 (2d Cir. 2008); *United*

States v. *Onyiego*, 286 F.3d 249, 256 (5th Cir. 2002); *United States* v. *Simmonds*, 235 F.3d 826, 834 (3d Cir. 2000).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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